No. 45494-7-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

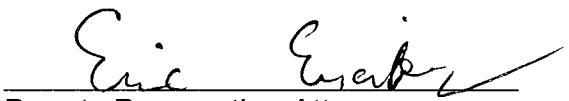
KEVIN WAYNE WILLIAMS,

Petitioner/Appellant.

Discretionary Review from the Lewis County Superior Court

RESPONDENT'S BRIEF

JONATHAN MEYER
Lewis County Prosecuting Attorney

By: 
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I. INTRODUCTION

Kevin Williams pleaded guilty to Unlawful Display of a Firearm, representing that he had potential defenses to the charge, but that he pleaded guilty to obtain a favorable jail recommendation from the prosecutor. Despite this representation, a year later Mr. Williams sought to withdraw the plea on a claim of ineffective assistance of counsel, asserting that he did not realize he had legal defenses to the charge. The District Court found no manifest injustice and denied his motion to withdraw the plea; the Superior Court and this Court's Commissioner agreed. Because Mr. Williams' counsel was not ineffective, and Mr. Williams made a conscious choice to plead guilty in lieu of his trial defenses, the Court should affirm his conviction.

II. STATEMENT OF THE CASE

On Dec. 15, 2007, two process servers came to Kevin Williams' house. Clerk's Papers (CP) at 75-76; CP at 17 (Declaration of Mr. Williams).[1] One of them approached Mr. Williams' door and hung a plastic bag containing papers on its handle. CP at 17, 76. Mr. Williams came out onto his second story porch and yelled at the

[1] Because Mr. Williams pleaded guilty, no trial ever occurred; the facts here come from admissions made by him or his attorney during this litigation.

woman about what the hell she was doing. CP at 17. The process server asked if he was Mr. Williams, and upon hearing that he was, said that she would leave papers for him at the door. *Id.* As the process server began walking away, Mr. Williams fired a gunshot to show her he was serious. CP at 17-18. On Mr. Williams' orders, the process server came back and retrieved the papers, then dumped them out of the bag at some distance from his house so Mr. Williams could see them. CP at 17-18, 76. The process server then obeyed Mr. Williams' command to leave. *Id.* Mr. Williams exited his house and, armed with a rifle, followed the woman 100 feet down to the street where her car was. CP at 18–19, 76.

Although there was no evidence that the process server was doing anything other than serving papers on Mr. Williams, Mr. Williams claimed that he threatened her at gunpoint in self-defense. CP at 17–19, 76. He predicated this claim on the fact that his mailbox had been blown up shortly before this incident.[2] CP at 17, 76.

The State charged Mr. Williams with one count of unlawful display of a weapon and one count of unlawfully discharging a

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[2] Mr. Williams continues to make this claim, even though he is in federal prison for blowing up his own mailbox as part of a scheme to defraud witnesses in a federal case. *See* CP at 11–14 (Docket Entries of 10-27-10, 3-16-11, 5-16-11, 9-21-11, and 10-11-11). Mr. Williams also asserted more than once that he had essentially no criminal history other than a DUI in 1995, despite having dozens of prior convictions. CP at 53, 77, 81; 92.

firearm. CP at 5–6 (Complaint). Mr. Williams eventually pleaded guilty to the unlawful display count in exchange for dismissal of the discharging a firearm count. CP at 75-76 (transcript of plea hearing). The plea was made pursuant to *North Carolina v. Alford*:[3] Mr. Williams explicitly represented that he was giving up his self-defense claim to take advantage of a no-jail plea offer. *Id.* The Court accepted the plea after a colloquy and sentenced Mr. Williams to all time suspended. CP at 77-78.

Mr. Williams later filed an appeal, which was converted into a motion to withdraw his plea. CP at 11 (Docket entry of 1-25-11); CP at 25. He argued that his attorney had not adequately advised him about the plea. Specifically, Mr. Williams stated that his attorney got him nothing because Mr. Williams had acted in self-defense, and because unlawful display of a weapon had a statutory defense excluding displays in the person's place of abode or made in self-defense. CP at 56-57; CP at 89-91.

At the hearing on the matter, the State pointed out that even in Mr. Williams' version of the facts, he did not qualify for the statutory defenses. CP at 138-40. The district court agreed: Mr. Williams'

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[3] *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed.2d 162 (1970). The plea also evokes *In re Barr*, 102 Wn.2d 265, 684 P.2d 712 (1984), but does not mention the case by name.

filings demonstrated that his defense attorney had given him candid advice about his legal options, and Mr. Williams had decided to take the plea offer instead of pursuing his self-defense claim. *See* CP at 144-50 (going over the facts in detail); CP at 54-56 (Mr. Williams' account of his interaction with his attorney). The judge found no ineffective assistance of counsel and no manifest injustice allowing for Mr. Williams to withdraw his plea.[4] CP at 150.

Mr. Williams appealed the decision to the Superior Court. CP at 1. That court concluded that there was no evidence of ineffective assistance—Mr. Williams' attorney had advised him based on the legitimate strategy of obtaining a no-jail offer. CP at 172-73. Mr. Williams' self-serving statements to the contrary did not demonstrate a manifest injustice allowing withdrawal of his plea. *Id.*

Mr. Williams sent in a Notice of Appeal [sic], which apparently did not get filed with the Superior Court. *See* CP at 182-83. The Court accepted a late notice of discretionary review for good cause. Order Accepting Late Filing (Dec. 30, 2013); CP at 198.

This Court's Commissioner then denied review. Ruling Denying Review (June 19, 2014). The Commissioner rejected Mr.

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[4] Months later and ex parte, a prosecutor (other than the undersigned) improperly presented written findings and conclusions to the District Court. CP at 127-28; 171. The Superior Court declined to consider the improper document, relying instead on the judge's oral findings and conclusions from the hearing. CP at 171.

Williams' claims of the following errors: (1) improper written findings of fact (because the Superior Court did not consider them), (2) merger or double-jeopardy overlap in the charges (because the charges were distinct and one was dismissed), (3) statutory defenses to the charges (because they were unsupported or only debatable), (4) ineffective assistance (because the plea was a reasonable strategy), and (5) failure to advise about losing a concealed weapons permit (because that is a collateral consequence of the conviction). *Id.*

Mr. Williams filed a motion to modify the Commissioner's ruling, Motion to Modify (July 28, 2014), which the Court granted without explanation, Order Granting Motion to Modify (Sept. 2, 2014). The matter is now before the Court for decision.

III. ARGUMENT

1. The Court should not consider Mr. Williams' as-applied constitutional challenge, raised for the first time on appeal.

For the first time in his opening brief, Mr. Williams argues that the State had no jurisdiction to prosecute him because he was acting in self defense, under the protections of the use-of-force statutes and the state constitutional right to bear arms. Defendant/Petitioner's Opening Brief at 5-6 (Argument 1). This amounts to an as-applied

constitutional challenge to the Unlawful Display of a Firearm statute—whereas previously, Mr. Williams' claims were directed at withdrawing his plea due to alleged ineffective assistance. *See* CP at 50-58; 84-92, 117-26. The Court should decline to consider this new argument because it is not a manifest error affecting a constitutional right.

The Court will ordinarily refuse to decide an issue raised for the first time on appeal unless it challenges jurisdiction or claims manifest constitutional error. RAP 2.5(a). Although Mr. Williams uses the word jurisdiction, his argument is not really a jurisdictional challenge: he does not dispute that he was charged with a nonfelony crime alleged to have occurred in Lewis County. *See* RCW 3.66.060 (giving the Lewis County District Court jurisdiction over such crimes). Rather, he alleges that applying the statute to his behavior in this case was unlawful.

To the extent that this claim is constitutional, it is neither manifest nor demonstrates error. A manifest error is one apparent enough on the record to have been "reasonably obvious to the trial court." *State v. O'Hara*, 167 Wn.2d 91, 108, 217 P.3d 756 (2009). Mr. Williams has provided no analysis of either the federal or state right to bear arms that suggests that the Unlawful Display statute was

unconstitutionally applied to him. On the contrary, his own account demonstrates that, after shooting a warning shot at a process server to scare her, he left his house and followed her 100 feet down towards her car while wielding a firearm. CP at 17–19. The act criminalized was not his possession of a firearm, but his threatening use of it without sufficient justification. *See* RCW 9.41.270(1) (criminalizing the display of a weapon when it "manifests an intent to intimidate another or that warrants alarm for the safety of other persons"). This statute is presumed constitutional. *State v. Ward*, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994). Mr. Williams has not met his burden of demonstrating that prosecution on these facts was a manifest constitutional error. The Court should decline to consider this new argument, which has neither been adequately briefed nor addressed in the record for sufficient review.

2. It was within the District Court's discretion to deny Mr. Williams' motion to withdraw his guilty plea.

Three judicial officers have now considered Mr. Williams' motion to withdraw his guilty plea, and all three have decided that it lacked merit. The Court should affirm his conviction.

A defendant seeking to withdraw his plea of guilty must establish a manifest injustice; the district court's denial of a motion to withdraw a plea may be overturned only for abuse of discretion.

State v. Marshall, 144 Wn.2d 266, 280-81, 27 P.3d 192 (2001), *abrogated on unrelated grounds by State v. Sisouvanh*, 175 Wn.2d 607, 622-23 n.3 (2012).

Mr. Williams' asserted manifest injustice is ineffective assistance of counsel, predicated on his counsel's failure (1) to advise him that he might lose his right to a concealed pistol license as a result of the plea, (2) to account for Mr. Williams' statutory and self-defense claims, and (3) to account for the fact that the unlawful-display and unlawful-discharge charges might merge or violate double jeopardy. None of these allegations establish ineffective assistance or any manifest injustice.

On point one, the effect of a criminal conviction on Mr. Williams' concealed weapons permit was a collateral consequence of his plea, of which he did not have to be advised to plead guilty. *State v. Johnston*, 17 Wn. App. 486, 493, 564 P.2d 1159 (1977). This is because it was not "a definite, immediate, and largely automatic" matter affecting the range of his punishment for the crime; rather, it was some later civil consequence. *Cf. id.* (quoting *Cuthrell v. Director, Patuxent Inst.*, 475 F.2d 1364 (4th Cir. 1973)). Mr. Williams' attorney could constitutionally choose not to dwell on the concealed weapons permit when there were more direct

consequences, such as jail and the charges of conviction, at stake. Furthermore, this conviction is not what presently prevents Mr. Williams from possessing a concealed weapons permit: his conviction for a federal felony prevents him from doing so. Thus, there is no prejudice to Mr. Williams from this alleged oversight, and therefore no ineffective assistance. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), (requiring both deficient performance and prejudice).

On point two, Mr. Williams statutory and self-defense claims were not supported in the facts, or at least were merely debatable rather than the ironclad. Mr. Williams wielded a weapon *outside* his place of abode, pursuing a process server down to her car. CP at 17-19. Because the woman was essentially fleeing at that point, it was doubtful that the statutory defenses Mr. Williams relies on would apply. *See* RCW 9.41.270(3) (decriminalizing display of weapons inside one's abode or when defending against unlawful force); *see also State v. Owens*, 180 Wn. App. 846, 855, 324 P.3d 757 (2014) (holding that "place of abode" does not encompass a display in a yard outside the home). Mr. Williams also asserts that he did not fire in a manner that endangered the process server or anyone else, but

that fact would be subject to a jury's determination.[5] In light of these issues, Mr. Williams' defense attorney believed he could beat one charge, but not both. CP at 55. He advised Mr. Williams accordingly, and Mr. Williams accepted a plea offer that reduced his potential exposure to punishment. CP at 55-56, 77-77. Strategic decisionmaking of this nature may not be Monday-morning-quarterbacked through an ineffective assistance claim. *See State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996) (legitimate strategy is not deficient performance).

On point three, the facts here did not suggest that the unlawful discharge and unlawful display counts would merge or be subject to vacation under double jeopardy. Mr. Williams took a shot that allegedly endangered other people. *Cf.* RCW 9.41.230(1)(b) (criminalizing the willful discharge of a firearm "in any place where any person might be endangered thereby"). The woman he attempted to scare with the shot was scared, and retreated. Mr. Williams then followed her, wielding a weapon under circumstances creating concern for others' safety. *Cf.* RCW 9.41.270(1)

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[5] Defense counsel may have concluded that Mr. Williams would not be a credible witness. That belief is consistent with the facts now known: Mr. Williams' self-defense claim makes little sense if he blew up his own mailbox, and he misrepresented his criminal history during this case. So, Defense counsel may have sensed some credibility problems.

(criminalizing the exhibit or display of a firearm under circumstances "warrant[ing] alarm for the safety of other persons"). The two charges targeted separate acts, governed by separate legal standards, with separate criminal elements—so, double jeopardy and merger would not apply. Moreover, in practical effect, Mr. Williams' attorney *won* on the theory that Mr. Williams should be subject to conviction of only one of the crimes, because the other was dismissed per the plea. Seeking this outcome was a reasonable strategy and produced no prejudice; it was not ineffective assistance. *See Hendrickson*, 129 Wn.2d at 77-78.

All of the foregoing refutes Mr. Williams' claims of manifest injustice *de novo*. The question before this Court is more deferential: whether the District Court, hearing what was presented, abused its discretion in deciding that Mr. Williams had not met his burden. *Marshall*, 144 Wn.2d at 280-81. It did not do so. Mr. Williams understood the risks and benefits of entering his plea, and his later assertions to the contrary showed buyer's remorse but not manifest injustice. *See* CP at 50-58, 75-77, 143-50. The Court should affirm his conviction.

IV. CONCLUSION

Kevin Williams seeks discretionary review of the RALJ decision affirming the denial of his motion to withdraw his plea. Mr. Williams' own recitations of fact prove that his claims of error are ill-founded, and that his defense attorney wisely advised him to take a favorable plea offer. The courts below did not err in denying Mr. Williams' motion or affirming that outcome. This Court should likewise affirm Mr. Williams' conviction.

RESPECTFULLY submitted this 5 day of August, 2015.

JONATHAN MEYER
Lewis County Prosecuting Attorney

by: _____
ERIC EISENBERG, WSBA #42315
Attorney for Plaintiff

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. KEVIN WAYNE WILLIAMS, Appellant.	)	NO. 45494-7 DECLARATION OF MAILING

I, Casey Mauermann, paralegal for Eric Eisenberg, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On August 6, 2015, the Respondent's Brief was filed via the Division II upload and a copy was mailed to the Appellant by depositing same in the United States Mail, postage pre-paid, to the address indicated below:

Kevin W. Williams
#60078-019
Federal Correction Institution
PO Box 3725
Adelanto CA 92301

DATED this 11th day of August, 2015, at Chehalis, Washington.

CASEY L. MAUERMANN, Paralegal
Lewis County Prosecuting Attorney's Office

LEWIS COUNTY PROSECUTOR

August 06, 2015 - 3:26 PM

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Court of Appeals Case Number: 45494-7

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eric.eisenberg@lewiscountywa.gov

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. KEVIN WAYNE WILLIAMS, Appellant.	))))))))	NO. 45494-7 AMENDED DECLARATION OF MAILING

I, Casey Mauermann, paralegal for Eric Eisenberg, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On August 14, 2015, the Amended Declaration of Mailing was filed via the Division II upload and a copy along with a copy of the Respondent's Brief filed on August 6, 2015 was mailed to the Appellant by depositing same in the United States Mail, postage pre-paid, to the address indicated below:

Kevin W. Williams
#60078-019
Federal Correction Institution
PO Box 3007
Terminal Island CA 90731

DATED this 14th day of August, 2015, at Chehalis, Washington.

CASEY L. MAUERMANN, Paralegal
Lewis County Prosecuting Attorney's Office

LEWIS COUNTY PROSECUTOR

August 14, 2015 - 11:01 AM

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Court of Appeals Case Number: 45494-7

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Comments:

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